No. 97-1325

(2)

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1997

PALADIN ENTERPRISES, INC.,

*Petitioner,*

*vs.*

VIVIAN RICE, as guardian and next friend of TAMIELLE HORN, MARILYN FARMER, co-personal representative of the ESTATE OF MILDRED HORN, TIFFANI M. HORN, co-personal representative of the ESTATE OF MILDRED HORN, MICHAEL D. SAUNDERS, individually and next friend of COLIN D. SAUNDERS, a minor, and personal representative of the ESTATE OF JANICE Y. SAUNDERS,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit*

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTION PRESENTED

1. Whether triable issues of fact exist as to whether defendants, who aid and abet murder by publishing a detailed technical instruction manual on murder-for-hire techniques, may be held responsible in tort to the families of three victims murdered by a professional killer who purchased the defendants' manual and followed its detailed instructions, when the defendants have stipulated that in publishing, marketing, and distributing their manual they intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes, that they intended and had knowledge that their publications would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire, and that the defendants' conduct in fact assisted the killer in the perpetration of the murders that are the subject of this litigation, or whether defendants are instead entitled to summary judgment because the First Amendment absolutely precludes the imposition of such liability in these circumstances as a matter of law.

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## STATEMENT OF THE CASE

### A. Petitioner's Statement of the Case Deliberately Ignores The Fact That It Has *Stipulated* to Every Element of the Crime of Aiding And Abetting Murder.

The Petitioner, Paladin Enterprises, Inc. (hereinafter "Paladin"), published the murder manual *Hit Man: A Technical Manual for Independent Contractors*. Paladin stipulated that it marketed this manual to attract and assist criminals. It stipulated that it knew and intended that the manual would be used, upon receipt, by real murderers to plan and execute killings. It stipulated that its conduct in fact assisted a professional killer to commit three murders:

> . . . . 4. Defendants concede, for purposes of this motion, and for no other purposes, that:
>
> a. defendants engaged in a marketing strategy intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes; and
>
> b. in publishing, marketing, advertising and distributing *Hit Man* and *Silencers*, defendants intended and had knowledge that their publications would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire, in the manner set forth in the publications. . . .
>
> 7. Defendants concede, for the purpose of this motion and for no other purposes, that in publishing, distributing and selling *Hit Man* and *Silencers* to Perry, defendants assisted him in the subsequent perpetration of the murders which are the subject of this litigation . . . .

App. 16a-18a n.2.

These stipulations are sufficient, as a matter of law, to constitute aiding and abetting murder. App. 36a-38a; *Apostoledes v. State*, 323 Md. 456, 593 A.2d 1118, 1121 (1991); *Anello v. State*, 201 Md. 164, 93 A.2d 71, 72-73 (Md. 1952).

In the face of these extraordinary stipulations, Paladin moved for summary judgment, claiming absolute protection from liability under

the First Amendment. Even if the most egregious behavior on the part of Paladin was assumed, it argued, the First Amendment still protected it, for a publisher cannot be held responsible for providing instructions used to commit murder even when it knows and intends that those instructions will be used to kill. When distilled to its essential core, Paladin's argument is that the First Amendment is a license to aid and abet murder. This radical construction of the First Amendment was properly repudiated by the Court of Appeals, and there is no warrant for this Court to disturb that judgment. Paladin's strategic choice to file its Motion for Summary Judgment was a gamble which it lost. Having lost, it must now litigate. This case should proceed to trial.

Whether review of the issues presented in this litigation will ever be appropriate in this Court, it certainly is not appropriate at this juncture. It is an axiom of this Court's jurisprudence to avoid premature review of constitutional questions. The First Amendment issues presented in the Petition for Certiorari ought not be considered and resolved by this Court on the basis of a skeletal, stipulated record, devoid of the context that would be provided by discovery and trial, and prior to examination of such a fully-developed factual record by the courts below. The sound management of this Court's scarce time and resources, as well as the wisdom of eschewing review of constitutional issues prior to their illumination through the development of a full factual record, are sufficient grounds alone to deny the writ at this time.

**B. The Decision Below Does Not Conflict With The Law of Other Circuits.**

The Court of Appeals exhaustively canvassed the decisional law of all other federal circuits that have examined issues analogous to those presented in this suit. As the Court aptly observed,

> *every* court that has addressed the issue, including this court, has held that the First Amendment does not necessarily pose a bar to liability for aiding and abetting a crime, even when such aiding and abetting takes the form of the spoken or written word.

App. 22a.

**C. The Decision Below Does Not Conflict with *Brandenburg v. Ohio*.**

The decision below does not conflict with *Brandenburg v. Ohio*, 394 U.S. 705 (1969). The opinion of the Court of Appeals distinguished

*Brandenburg* on two separate grounds, each of which stands as an adequate and independent basis for denying the writ. First, the Court of Appeals, following the consistent and uniform holdings of every other circuit that has addressed the question, held that *Brandenburg* does not insulate a defendant from liability when the defendant's speech goes beyond the bounds of abstract advocacy and into the realm of providing specific instruction that aids and abets another in the commission of a criminal offense. App. 23a-24a. The Court of Appeals applied *Brandenburg* conscientiously and correctly, drawing the sound distinction between mere "abstract teaching" and more concrete preparation and instruction to aid and abet crime. This was exactly the distinction drawn by *Brandenburg* itself, in which this Court admonished that " 'the mere abstract teaching . . . of the moral propriety or even moral necessity of a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.' " 395 U.S. at 448, *quoting Noto v. United States*, 367 U.S. 290, 297-98 (1961).

As a second and alternative basis for its ruling, the Court of Appeals held that even on its terms, the *Brandenburg* formulation did not warrant granting Paladin judgment as a matter of law. App. 64a, n.11. The Court properly held that at the very least, the Respondents were entitled to a jury trial under the *Brandenburg* standard, reasoning that the extraordinary stipulations entered into by Paladin, stipulations the Court characterized as "astonishing," App. 71a, were sufficient to avoid summary judgment under *Brandenburg*. Perhaps more importantly, the Court of Appeals, conscientiously exercising its obligation to engage in "independent appellate review" of the First Amendment standard as applied to the text of *Hit Man,* painstakingly dissected the manual, concluding that considering the almost unique nature of these facts, the First Amendment does not, and should not, bar the imposition of civil liability in this case. App. 71a.

**D. The Decision Below Does Not Conflict With The Principles of *The Florida Star v. B.J.F.* or *Smith v. Daily Mail Publishing Co.***

The decision below does not conflict with this Court's decisions in *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) and *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979). In *Florida Star,* this Court

rejected the imposition of liability for the inadvertent publication of the name of a rape victim, and in *Daily Mail,* the Court struck down an indictment of two newspapers for violating a state statute forbidding the publication of the names of juvenile offenders without the written approval of the juvenile court. These cases merely recite the broad truism that "if a newspaper lawfully obtains truthful information about a matter of public significance, the state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Florida Star*, 491 U.S. at 533, *quoting Daily Mail*, 431 U.S. at 103.

Contrary to Paladin's suggestions, which are raised for the first time in their Petition, in both cases this Court *rejected* the sweeping position that the First Amendment absolutely bars the imposition of liability for the publication of truthful information lawfully obtained, instead holding that liability must be justified by the vindication of state interests of the "highest order." Indeed, in *Florida Star* this Court actually acknowledged that protection of the identity of rape victims *did* constitute an interest of the highest order — but the Court found numerous constitutional flaws in Florida's regime, such as its singling out of the media for special treatment, and the lack of any restraining requirements of culpability or intent. In contrast, liability in this case is predicated on a law of general applicability — the doctrines of criminal and tortious aiding and abetting.

The information at issue is not the identity of participants in judicial proceedings, but specific instruction and encouragement intended to be used to assist in aiding and abetting crime. Imposing tort liability for those who knowingly and intentionally traffic in the aiding and abetting of murder is clearly an interest of the highest order, and nothing in *Florida Star* or *Daily Mail* stands as a barrier to such liability.

**E. The Decision Below Presents No Issues of Extraordinary Importance.**

The Petition for Certiorari makes it sound as if the sky will fall if the decision of the Court of Appeals is allowed to stand without immediate review by this Court. The grave constitutional evil supposedly posed by the Court of Appeals decision is that Paladin will now be forced to litigate, before a trier-of-fact, the issue of whether it actually

possessed the intent to which it stipulated for the purposes of its Motion for Summary Judgment. The position is untenable. The gist of Paladin's Motion for Summary Judgment was the legal argument that *even if* it possessed the intent to which it stipulated — an intent also brazenly manifest on the pages of *Hit Man* itself — it was nonetheless immune from liability as a matter of law. If its legal position fails — if the First Amendment does not absolutely bar liability under such predicate circumstances—than *of course* it follows that Paladin must now bear the burdens of litigation. As this Court established in *Herbert v. Lando*, 441 U.S. 153 (1979), in the aftermath of its creation of the "knowing or reckless falsehood" standard for libel of public figures in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), defendants enjoy no special First Amendment immunity precluding inquiry into their subjective intent, when that subjective intent is an element of the very substantive First Amendment standard that protects them.

Paladin argues that under the rule announced by the Court of Appeals every manner of expression may now be hailed into court on the question of the publisher's intent, from the thriller novels of Tom Clancy, to network news reports on terrorist bombings. This is patently untrue. Paladin published an instruction manual intended to train killers, not a novel intended to entertain, or a news report intended to inform. This is indeed a case "unique in the law," as the Court of Appeals observed, App. 71a, precisely because of Paladin's stunning conduct. There is simply *no* credible threat to other publications posed by the standard employed by the Court of Appeals, because there is no credible likelihood that those publications could *ever* be found to possess the intent to which Paladin has stipulated. As the Court of Appeals emphasized,

> not only will a political, informational, educational, entertainment, or other wholly legitimate purpose for the description or depiction be demonstrably apparent; but the description or depiction of the criminality will be of such a character that an inference of impermissible intent on the part of the producer or publisher would be unwarranted as a matter of law.

App. 69a.

Paladin attempts to avoid the thrust of this entirely dispositive argument by arguing that *Hit Man* is ambiguous in its intent. Paladin constantly makes light of its manual, treating it as a comedy or farce. This refrain is, at best, jury argument. The Court of Appeals, obviously frustrated by the extravagance of this point, used even stronger words:

> After carefully and repeatedly reading *Hit Man* in its entirety, we are of the view that the book so overtly promotes murder in concrete, nonabstract terms that we regard as disturbingly disingenuous both Paladin's cavalier suggestion that the book is essentially a comic book whose "fantastical" promotion of murder no one could take seriously, and amici's reckless characterization of the book as "almost avuncular."

App. 42a.

In sum, the shrill tone of panic that permeates the Petition for Certiorari ought not distract this Court from accepting the Court of Appeals patient and meticulous review of *Hit Man*, a review that overwhelming established the Respondent's entitlement to a jury trial:

> The unique text of *Hit Man* alone, boldly proselytizing and glamorizing the crime of murder and the "profession" of murder as it dispassionately instructs on its commission, is more than sufficient to create a triable issue of fact as to Paladin's intent in publishing and selling the manual.

App. 42a.

## REASONS FOR DENYING THE WRIT

### I. REVIEW BY THIS COURT IS NOT APPROPRIATE AT THIS JUNCTURE, PRIOR TO FULL DEVELOPMENT OF A FACTUAL RECORD AT TRIAL.

Paladin has stipulated to the elements of aiding and abetting murder.[1] *See* App. 36a-38a; *Apostoledes v. State*, 323 Md. 456, 593 A.2d 1118, 1121 (1991); *Anello v. State*, 201 Md. 164, 93 A.2d 71, 72-73 (1952).

1. In its artfully sanitized paraphrasing of the Joint Statement of Facts, Paladin understandably attempts to soft-pedal the full force of its stipulations. The full text of the Joint Statement of Facts was not offered by Petitioners, although it is contained in the Opinion below. App. 16a-18a.

The Court of Appeals merely held that, given Paladin's astonishing stipulations, and the unique character and content of the murder instruction manual, *Hit Man*, triable issues of fact were presented as to whether Paladin may be held responsible in tort to the families of three victims murdered by a professional killer who purchased Paladin's manual and followed its detailed instructions.

Paladin made a strategic litigation choice. Rather than proceed to discovery and trial, Paladin conceded the worst, admitting, for the purposes of presenting its Motion for Summary Judgment, that in publishing, marketing, and distributing its murder instruction manual, it intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes, that it intended and had knowledge that its murder manual would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire, and that its conduct in fact assisted the killer in the perpetration of the terrible murders that gave rise to this suit. Paladin thus engaged in the calculated gamble that it could prevail even in the face of these extreme stipulations. Having lost that gamble, it must now proceed to trial.

Whether review of the issues presented in this litigation will ever be appropriate in this Court, it certainly is not appropriate at this juncture. As Justice Brandeis admonished in his famous restatement of this Court's prudential rules of restraint, the "Court will not anticipate a question of constitutional law in advance of the necessity of deciding it." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (internal cite omitted). This Court has constantly heeded Justice Brandeis' restraining wisdom, notwithstanding "the availability of thoroughly prepared attorneys to argue both sides of a constitutional question, and of numerous amici curiae ready to assist in the decisional process, even though all of them 'stand like greyhounds in the slips, straining upon the start.' " *Kremens v. Bartley*, 431 U.S. 119, 133-34 n.15 (1977).

Incredibly, in its Petition for Certiorari, Paladin actually maintains that the decision of the parties to submit a joint statement of facts for the purposes of the Motion for Summary Judgment is a factor *favoring* immediate review by this Court. This is backwards. That Paladin chose

to move for summary judgment on the basis of the radical stipulations and extraordinary legal positions it has advanced certainly does not impress upon this Court any obligation to prematurely review constitutional questions that it would otherwise prudentially avoid. Nor does it matter that Paladin's defense is based on the First Amendment. This Court routinely denies petitions in First Amendment litigation even after full trials, let alone after mere denial of a Motion for Summary Judgment.

The First Amendment questions presented in the Petition for Certiorari ought not be considered and resolved by this Court on the basis of a skeletal, stipulated record, devoid of the context that would be provided by discovery and trial, and prior to examination of such a fully-developed factual record by the courts below. *See Turner Broadcasting System v. Federal Communications Commission*, 512 U.S. 622, 667 (1994) ("Because of the unresolved factual questions, the importance of the issues to the broadcast and cable industries, and the conflicting conclusions that the parties contend are to be drawn from the statistics and other evidence presented, we think it necessary to permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining, before passing upon the constitutional validity of the challenged provisions."). Recognizing the doctrinal complexity and important role of factual context in First Amendment adjudication, this Court has been especially cautious about reaching out unnecessarily to decide free speech issues before it must, or on grounds broader than required to dispose of a case before it. *See Denver Area Educational Telecommunications Consortium v. Federal Communications Commission*, 116 S. Ct. 2374, 2384-85 (1996). The sound management of this Court's scarce time and resources, as well as the wisdom of eschewing review of constitutional issues prior to their illumination through the development of a full factual record, are sufficient grounds standing alone to deny the writ at this time.

## II. THE DECISION BELOW DOES NOT CONFLICT WITH THE LAW OF OTHER CIRCUITS.

The Court of Appeals found utterly unpersuasive the arguments of Paladin below that law from other federal circuits and state jurisdictions supports the radical interpretation of the First Amendment Paladin has

advanced in this litigation. After exhaustively canvassing that decisional law the Court of Appeals correctly observed that

> *every* court that has addressed the issue, including this court, has held that the First Amendment does not necessarily pose a bar to liability for aiding and abetting a crime, even when such aiding and abetting takes the form of the spoken or written word.

App. 22a.[2]

As then-Judge Kennedy, writing for the Ninth Circuit in *United States v. Freeman*, 761 F.2d 549 (9th Cir. 1985), *cert. denied*, 476 U.S. 1120 (1986), explained, "[i]n those instances, where speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone." *Id.* at 552 (citations omitted).[3] *See also United States v. Barnett*, 667 F.2d 835, 843 (9th

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2. The accuracy of the Court of Appeals' reading of the law of other circuits was reinforced by a report on the issues pertinent to this litigation issued by the Department of Justice on the eve of oral argument below. *See* Department of Justice, Report on the Availability of Bombmaking Information, the Extent to Which Its Dissemination is Controlled by Federal Law, and the Extent to Which Such Dissemination May Be Subject to Regulation Consistent with the First Amendment to the United States Constitution (April 1997) [hereinafter "DOJ Report"] ("But the tax-avoidance aiding and abetting cases are not subject to *Brandenburg* because culpability in such cases is premised, not on defendants' 'advocacy' of criminal conduct, but on defendants' successful efforts to assist others by detailing to them the means of accomplishing crimes.") App. 197a-199a.

3. Paladin's attempt to spin a circuit conflict out of *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), *cert. denied*, 466 U.S. 980 (1984) is entirely unpersuasive. In *Dahlstrom* the government attempted to prosecute the defendants for doing nothing more than promoting and publishing a *legal* tax shelter program. It was in this context, in which the tax shelter provisions were legal, that the court held that no liability could be imposed unless the government satisfied the *Brandenburg* test, and that nothing in the record before it satisfied that test. *Id.* at 1428. Unlike *Dahlstrom*, the "how to commit murder for hire" transactions described in *Hit Man* are patently and manifestly illegal. And unlike *Dahlstrom*, Respondents have at the very least clearly placed in issue triable issues of fact under the *Brandenburg* standard. Indeed,

(Cont'd)

Cir. 1982) (holding that the First Amendment does not provide publishers a defense as a matter of law to charges of aiding and abetting a crime through the publication and distribution of instructions on how to make illegal drugs, rejecting as a "specious syllogism" with "no support in the law" the publisher's argument that there could be no probable cause to believe that a crime had been committed because its actions were shielded by the First Amendment, stating that "To the extent . . . that *Barnett* appears to contend that he is immune from search or prosecution because he uses the printed word in encouraging and counseling others in the commission of a crime, we hold expressly that the first amendment does not provide a defense as a matter of law to such conduct."); *United States v. Buttorff*, 572 F.2d 619, 623-24 (8th Cir. 1978), *cert. denied*, 437 U.S. 906 (1978) (sustaining convictions for aiding and abetting the filing of false or fraudulent tax returns against defendants who spoke at large public meetings where they offered detailed instructions on how to illegally avoid paying taxes and frustrate the administration of the Internal Revenue Service, stating: "Although the speeches here do not incite the type of imminent lawless activity referred to in criminal syndicalism cases, the defendants did go beyond mere advocacy of tax reform. They explained how to avoid withholding and their speeches and explanations incited several individuals to activity that violated federal law and had the potential of substantially hindering the administration of the revenue. This speech is not entitled to first amendment protection and, as discussed above, was sufficient action to constitute aiding and abetting, the filing of false or fraudulent withholding forms."); *United States v. Mendelsohn*, 896 F.2d 1183, 1186 (9th Cir. 1990) (holding *Brandenburg* inapplicable to a conviction for conspiring to transport and aiding and abetting where defendants disseminated a computer program that assisted others to record and analyze bets on sporting events, on grounds that the program was "too instrumental in and intertwined with the performance of criminal activity

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*Dahlstrom* was distinguished on precisely these grounds by then-Judge Kennedy in *United States v. Freeman*, 761 F.2d 549 (9th Cir. 1985), which found *Dahlstrom* not controlling because the transactions proposed in that case were not clearly illegal, while the illegality of the transactions in *Freeman* were "manifest."

to retain first amendment protection"); *United States v. Rowlee*, 899 F.2d 1275, 1279 (2d Cir. 1990), *cert. denied*, 498 U.S. 828 (1990) (rejecting First Amendment defense to aiding and abetting convictions in case involving "step-by-step instructions on how to prevent employers from withholding both state and federal income taxes," noting that the consensus of every federal Court of Appeals was that liability for a false or fraudulent tax return cannot be avoided by invoking the First Amendment and stating, "we think it would have made for a simpler and cleaner case if the district court had not referred to the First Amendment at all" because "[t]o the extent that the concept of 'imminent lawless action' has any role to play in this non-syndicalism case" that concept was already incorporated in the criminal statute); *National Organization for Women v. Operation Rescue*, 37 F.3d 646, 656 (D.C. Cir. 1994) ("[t]hat 'aiding and abetting' of an illegal act may be carried out through speech is no bar to its illegality."); *United States v. Moss*, 604 F.2d 569 (8th Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980) (holding that the First Amendment did not protect defendant's speech which the challenged constitutionality of federal income tax laws and described how to avoid the federal withholding tax); *United States v. Fleschner*, 98 F.3d 155, 158-59 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2484 (1997) (holding that defendants who instructed and advised meeting attendees to file unlawful tax returns were not entitled to a First Amendment jury instruction on the charge of conspiracy to defraud the United States of income tax revenue because "[t]he defendants' words and acts were not remote from the commission of the criminal acts."); *United States v. Kelley*, 769 F.2d 215 (4th Cir. 1985) (same); *United States v. Daly*, 756 F.2d 1076, 1081-82 (5th Cir. 1985) (sustaining conviction for conspiracy to defraud the United States based on dissemination of information to members of church on how to file tax returns in a manner calculated to hamper Internal Revenue Service investigation, noting that the defendant "claims that his advocacy of a tax scheme, whether legal or illegal, is protected by the First Amendment, because it did not incite imminent lawless action. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). This claim is preposterous."); *United States v. Featherston*, 461 F.2d 1119, 1122 (5th Cir.), *cert. denied*, 409 U.S. 991 (1972) (rejecting First Amendment challenge to federal statute criminalizing the teaching or demonstration of the making of any

explosive device, 18 U.S.C. § 232(1), after construing statute to require "intent or knowledge that the information disseminated would be used in the furtherance of a civil disorder"); *National Mobilization Committee to End the War in Viet Nam v. Foran*, 411 F.2d 934, 937 (7th Cir. 1969) (similarly rejecting First Amendment challenge to 18 U.S.C. § 232(1), stating that the requirement of intent "narrows the scope of the enactment by exempting innocent or inadvertent conduct from its proscription."); *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992), *cert. denied*, 506 U.S. 1071 (1993) (sustaining a wrongful death cause of action against *Soldier of Fortune Magazine* arising from a "gun for hire" advertisement); *Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 48, 123 Cal. Rptr. 468, 472, 539 P.2d 36, 40 (1975) (sustaining an action for wrongful death when the decedent's automobile was negligently forced off a highway by a listener to the defendant's radio station, which was conducting a contest rewarding the first contestant to locate a disc jockey traveling throughout the listening area, rejecting the station's asserted First Amendment defense, holding that "[d]efendants' contention that the giveaway contest must be afforded the deference due society's interest in the First Amendment is clearly without merit. The issue here is civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to descendent. The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act.")[4]

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4. Paladin's attempt to conjure a conflict with the Fifth Circuit through their citation to *High Ol' Times, Inc. v. Busbee*, 621 F.2d 141 (5th Cir. 1980), *aff'g*, 456 F. Supp. 1035 (N.D. Ga. 1978), does not wash. In *Busbee*, the Fifth Circuit summarily affirmed a District Court opinion striking down a Georgia "head shop" law that, in part, made it illegal to publish information regarding illegal drug usage. The District Court stated in *Busbee* that "printed matter either assailing the state's controlled substances laws or extolling the attractions of certain unlawful substances and glorifying the drug culture may not be generally restricted." 465 F. Supp. at 1040. *Busbee* stands as no impediment to the imposition of liability for specific training intended to facilitate criminal acts, as the Fifth Circuit has elsewhere confirmed. *See United States v. Featherston*, 461 F.2d 1119, 1122 (5th Cir.), *cert. denied*, 409 U.S. 991 (1972) (rejecting First Amendment challenge to federal statute criminalizing the teaching or demonstration of the making of any explosive device where there is intent or knowledge that the information disseminated

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Paladin attempts to manufacture conflict where none exists by pretending that the so-called "copycat cases," upon which it has heavily relied from the onset of this litigation, are inconsistent with the decision below. In these copycat cases, material presented for artistic, entertainment, or educational purposes depicts activity that is dangerous or violent. A person exposed to the depiction, often a child, engages in behavior emulating the dangerous activity, resulting in injury or death. Courts confronted with tort claims arising in these circumstances routinely reject the imposition of liability.

As the Court of Appeals correctly observed, these copycat cases are not analogous to the present litigation, in which Paladin marketed a detailed murder instruction manual knowing and intending that it would be used to aid and abet murder:

> In the "copycat" context, it will presumably never be the case that the broadcaster or publisher actually intends, through its description or depiction, to assist another or others in the commission of violent crime; rather, the information for the dissemination of which liability is sought to be imposed will actually have been misused vis-a-vis the use intended, not, as here, used precisely as intended. . . . And, perhaps most importantly, there will almost never be evidence proffered from which a jury even could reasonably conclude that the producer or publisher possessed the actual intent to assist criminal activity.

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would be used in the furtherance of a civil disorder); *United States v. Daly*, 756 F.2d 1076, 1081-82 (5th Cir. 1985) (affirming conviction for conspiracy to defraud the United States based on dissemination of information on how to file tax returns in a manner that would interfere with Internal Revenue Service investigation). *See also Shackelford v. Shirley*, 948 F.2d 945, 551 (5th Cir. 1991) ("As speech strays further from the values of persuasion, dialogue and free exchange of ideas the first amendment was designed to protect, and moves toward threats made with specific intent to perform illegal acts, the state has greater latitude to enact statutes that effectively neutralize verbal expression."). Note also that this Court in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982) upheld a "headshop" law, holding tend to trafficking in solicitations for illegal activity.

App. 68a. This entirely distinguishes cases such as *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (1987), *cert. denied*, 485 U.S. 959 (1988), in which the publisher clearly does not intend that the depiction will be emulated. *Id.* at 1024 ("the explicit meaning of the words employed, attempts to *dissuade* its readers from conducting the dangerous activity it describes.") (Emphasis added). Indeed, the Court of Appeals was stunned by the outlandish claim of Paladin and its *amici* on this point:

> That the national media organizations would feel obliged to vigorously defend Paladin's assertion of a constitutional right to intentionally and knowingly assist murderers with technical information which Paladin admits it intended and knew would be used immediately in the commission of murder and other crimes against society is, to say the least, breathtaking.

App. 67a. Paladin's "breathtaking" arguments deserve no better response from this Court.

## III. THE DECISION BELOW DOES NOT CONFLICT WITH *BRANDENBURG v. OHIO*.

The decision below does not conflict with *Brandenburg v. Ohio*, 394 U.S. 705 (1969), in which this Court stated that

> the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting imminent lawless action and is likely to incite or produce such action.

*Id.* at 47. The opinion of the Court of Appeals distinguished *Brandenburg* on two separate grounds, each of which stands as an adequate and independent basis for denying the writ. First, the Court of Appeals, following the consistent and uniform holdings of every other circuit that has addressed the question, held that *Brandenburg* does not insulate a defendant from liability when the defendant's speech goes beyond the bounds of abstract advocacy and into the realm of providing specific instruction that aids and abets another in the commission of a criminal offense. App. 23a-24a. The Court of Appeals applied *Brandenburg* conscientiously and correctly, drawing

the sound distinction between mere "abstract teaching" and more concrete preparation and instruction to aid and abet crime.

Contrary to Paladin's assertions, the Court of Appeals decidedly did *not* denigrate or diminish the importance of *Brandenburg* in First Amendment jurisprudence, and did not cavalierly regard itself as "unencumbered" by *Brandenburg* or the subsequent decisions of this Court. Paladin has unfairly caricatured the analysis of the Court of Appeals, an analysis grounded in a dichotomy well-entrenched in First Amendment law, between "abstract advocacy" and detailed preparation and instruction intended to assist others in the commission of crime. Indeed, this Court drew precisely this distinction in *Brandenburg* itself, emphasizing that " 'the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.' " 395 U.S. at 448, *quoting Noto v. United States*, 367 U.S. 290, 297-98 (1961).

The Court of Appeals did not give *Brandenburg* a narrow construction but a generous one. The emphasis of the Court of Appeals was not merely on what *Hit Man* does *not* contain but on what it *does* contain. *Hit Man* cannot embrace any plausible claim to being mere "abstract teaching" of the "moral propriety" of murder. As the Court of Appeals accurately recognized, it is precisely what it claims to be, a "technical manual" published "*for*" the "independent contractor." It is steeped in detailed step-by-step instruction, including engineering specifications, photographs, diagrams, charts, sample maps, checklists, formulas, suggested prices, information on selection of weapons, methods for altering weapons and ammunition, killing techniques, travel arrangements, instructions on appropriate garb, money-laundering methods — *all* the protocols, particulars and minutia of contract murder from A to Z, punctuated page-by-page with exhortation and encouragement intended to prepare and steel the criminal for action.[5]

5. In the words of Judge Learned Hand:

> One may not counsel or advise others to violate the law as it stands. Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a

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Imagine that in *Brandenburg* itself the record had demonstrated that the leaders of the Ku Klux Klan rally did more than burn crosses and spout racist venom, but actually distributed material such as maps, diagrams, chemical formulas for bombs, travel arrangements, instruction on weapons selection, and specific killing techniques, thus crossing the line from mere abstract advocacy to specific training and preparation. And imagine that following those instructions, Klan members went out and committed murder, using the techniques distributed at the rally. And imagine that the Klan leaders *stipulated* that in distributing their material, they *knew and intended* that the information would be used to kill. And imagine that the Klan leaders were convicted not under a broadly-worded "criminal syndicalism" law, but for intentionally aiding and abetting murder. In those circumstances it is inconceivable that this Court would have reversed the convictions as beyond the pale of the First Amendment. To the contrary, this Court would surely have cited holdings such as *Noto v. United States*, 367 U.S. 290 (1961), labeling such conduct as "preparing a group for violent action and steeling it to such action." *Id.* at 297-98.

The Court of Appeals properly recognized the great purpose of the standard articulated in *Brandenburg*, eloquently explaining that the "right to advocate lawlessness is, almost paradoxically, one of the ultimate safeguards of liberty." App. 19a. The point of *Brandenburg* is to place even advocacy of violence, revolution, and murder within the ambit of the free speech principle. As the Court of Appeals stated:

> Even in a society of laws, one of the most indispensable freedoms is that to express in the most impassioned terms the most passionate disagreement with the laws themselves, the institutions of, and created by, law, and the individual officials with whom the laws and institutions are entrusted. Without the freedom to criticize that which constrains, there is no freedom at all.

App. 19a.

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> part of that public opinion which is the final source of government in a democratic state.

*Masses Publishing Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917), *rev'd on other grounds*, 246 F.2d (2d Cir. 1917).

What the Court of Appeals also recognized, however, is that the *Brandenburg* standard was never designed to insulate from liability the communication of detailed information intended to facilitate crime. There is no abstract advocacy in the detailed how-to instructions contained in *Hit Man*. Unlike the many decisions of this Court that comprise the *Brandenburg* line of precedent — all of which involved political or social discourse of some kind — the communication at issue here is nothing more than detailed factual information on how to go into business as a paid assassin and carry out executions. The long train of rulings of this Court dealing with such issues as advocacy of violence, incitement, symbolic speech, and graphic protest have *all* involved speech pertaining to political or social issues. *See, e.g.*, *Schenck v. United States*, 249 U.S. 47 (1919) (World War I protest); *Abrams v. United States*, 250 U.S. 616 (1919) (World War I protest); *Whitney v. California*, 274 U.S. 357 (1927) (communist labor party convention); *Herndon v. Lowry*, 301 U.S. 242 (1937) (civil rights/communist party materials); *Dennis v. United States*, 341 U.S. 494 (1951) (communist party materials); *Bond v. Floyd*, 385 U.S. 116 (1966) (Vietnam protest); *Hess v. Indiana*, 414 U.S. 105 (1973) (Vietnam protest); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (civil rights boycott); *Cohen v. California*, 403 U.S. 15 (1971) (vulgar anti-draft message); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning to protest Republican Party policies). The speech in *Hit Man* simply does not fit within this list.[6] *Hit Man* is not political manifesto, not revolutionary diatribe, not propaganda or protest, nor an outpouring of conscience or credo. It is *instruction*, pure and simple, in the dark arts of mercenary murder.[7]

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6. Indeed, *Brandenburg* and its progeny speak to the problem of inciting crowds to lawless activity, a set of concerns inapplicable and irrelevant to the deliberate planning and execution of a criminal act to occur in the future such as presented here.

7. The submission of Paladin, that the decision below is inconsistent with holdings such as *Hess v. Indiana*, 414 U.S. 105 (1973) and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) is thus plainly wrong. In *Hess* the Court held that a statement made in the midst of a anti-Vietnam War protest on the University of Indiana campus that "We'll take the . . . street later" was protected under *Brandenburg*. In *Claiborne* the Court similarly held protected a statement made in connection with a civil rights boycott that "If we catch

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This Court has *never* applied *Brandenburg*, or any variant of the clear and present danger test, to insulate an actor from liability when that actor supplied detailed, specific training or instruction used to aid and abet crime. As previously demonstrated, the myriad lower court opinions that have examined and applied this dichotomy have all reached the same conclusion as the Court of Appeals below, holding that in such instances the First Amendment provides no shelter from liability.[8]

The bedrock principle animating the First Amendment is that the government may not censor speech on the basis of viewpoint. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992). The decision of the Court of Appeals, however, indulges no viewpoint-discrimination. The remand for trial does not invite a jury to punish Paladin because its speech is revolting, disgusting, or morally repugnant. This is not an offensive speech case; nor an advocacy of unpopular ideas case. This is a case about tort liability for aiding and abetting murder. The gravamen of the cause of action is not a reader's intellectual or emotional disgust at the evil of Paladin's publication. This suit is not about taking sides in the marketplace of ideas; indeed, it is not about *ideas* at all. This suit is about recompense for physical violence and death assisted by Paladin's publication of an instruction manual for murder, a manual that was used in this case precisely as the words in the manual instructed that it be used.[9]

The distinction relied upon by the Court of Appeals has long been central to First Amendment jurisprudence. In *Scales v. United States*, 367 U.S. 203, 233 (1961), for example, this Court meticulously

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any of you going in any of them racist stores, we're gonna break your damn neck." Both cases thus involved hyperbolic threats of future illegal action made in the midst of political and social protest. They had nothing whatsoever to do with detailed and specific training and instruction in techniques of crime, and are in no way consistent with the holding of the Court of Appeals here.

8. *See* Part II of this Brief in Opposition, examining decisional law in other circuits.

9. *See* Thomas Emerson, *The System of Freedom of Expression* p. 75 (1970) ("[C]onduct that amounts to 'advice' or 'persuasion' [sh]ould be protected; conduct that moves into the area of 'instructions' or 'preparations' [sh]ould not.").

distinguished between the teaching of abstract doctrine and the teaching of the *techniques* of criminal conduct. ("Here again, the participants did not stop with teaching of the inevitability of eventual revolution, but went on to explain techniques, both legal and illegal, to be employed in preparation for or in connection with the revolution.") *Scales* thus stated that the "teaching" of the forceful overthrow of the government may be constitutionally proscribed when "accompanied by directions as to the type of illegal action which must be taken when the time for the revolution is reached." *Id. See also Yates v. United States*, 354 U.S. 298, 331-33 (1957) (repeatedly emphasizing that convictions could not be sustained on basis of mere "advocacy of violence as a theoretical matter" but acknowledging that conduct could be punished if the "teaching was to prepare the members of the underground apparatus to engage in, to facilitate, and to cooperate with violent action directed against government when the time was ripe.") This distinction between teaching theory and teaching technique was similarly emphasized by Justice Douglas in *Dennis v. United States*, 341 U.S. 494, 581 (1951) (Douglas, J., dissenting), in which he observed that

> [i]f this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale.

If the principle were otherwise, government would be paralyzed, for a large part of criminal and tortious activity is executed through the use of language, and "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed" *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978), *quoting Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949); *see also* Kent Greenawalt, *Speech, Crime and the Uses of Language* p. 85 (1989) ("The reasons of ordinary penal policy for covering communicative efforts to carry out ordinary crimes are obvious, and the criminal law

sensibly draws no distinction between communicative and other acts. Although assertions of fact generally fall within a principle of freedom of speech, what these sorts of factual statements contribute to the general understanding of listeners is minimal, and the state justifications for free speech that apply to speakers do not reach communications that are simply means to get a crime successfully committed."); Laurence H. Tribe, *American Constitutional Law* p. 837 (2d ed. 1988) ("And the law need not treat differently the crime of one man who sells a bomb to terrorists and that of another who publishes an instructional manual for terrorists on how to build their own bombs out of old Volkswagen parts.")[10]

As a second and alternative basis for its ruling, the Court of Appeals

10. As this Court explained in *Brown v. Hartlage*, 456 U.S. 45 (1982):

> Although agreements to engage in illegal conduct undoubtedly possess some element of association, the State may ban such illegal agreements without trenching on any right of association protected by the First Amendment. The fact that such an agreement necessarily takes the form of words does not confer upon it, or upon the underlying conduct, the constitutional immunities that the First Amendment extends to speech. Finally, while a solicitation to enter into an agreement arguably crosses the sometimes hazy line distinguishing conduct from pure speech, such a solicitation, even though it may have an impact in the political arena, remains in essence an invitation to engage in an illegal exchange for private profit, and may be properly be prohibited.

*Id.* at 55, *citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563-64 (1980); *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 388 (1973). *See also Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence"); *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) ("The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."); *Watts v. United States*, 394 U.S. 705 (1969) (*per curiam*) (holding facially constitutional federal statute prohibiting making threats to take the life or inflict bodily harm on the President of the United States).

held that even on its terms, the *Brandenburg* formulation did not warrant granting Paladin judgment as a matter of law. App. 64a, n.11. The Court properly held that at the very least, the Respondents may be entitled to a jury trial under the *Brandenburg* standard, reasoning that the extraordinary stipulations entered into by Paladin were sufficient to avoid summary judgment under *Brandenburg*.

Inexplicably, Paladin complains that it was improper for the Court of Appeals to place any credence on its stipulated *subjective* intent unless the text of *Hit Man* satisfies the *objective* requirements of *Brandenburg*. This is certainly not the law. In the First Amendment area, as in other fields of constitutional law, subjective intent is often dispositive. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (establishing actual malice standard in public official libel cases, requiring knowledge of falsity or reckless disregard for truth or falsity as a predicate to liability); *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (holding that the First Amendment does not bar the evidentiary use of speech to establish illegal intent.).

Be that as it may, it is doubtful that there are many reported cases in which a court has so thoroughly canvassed a text and so scrupulously demonstrated how it satisfies the objective legal standard under review. The Court of Appeals, conscientiously exercising its obligation to engage in careful independent review of the First Amendment standard as applied to the *Hit Man* text, *see Bose Corp v. Consumers Union of United States*, 466 U.S. 485 (1984), painstakingly dissected the manual, chapter-by-chapter, page-by-page. Summarizing that prodigious effort, the Court concluded:

> Paladin's astonishing stipulations, coupled with the extraordinary comprehensiveness, detail, and clarity of *Hit Man*'s instructions for criminal activity and murder in particular, the boldness of its palpable exhortation to murder, the alarming power and effectiveness of its peculiar form of instruction, the notable absence from its text of the kind of ideas for the protection of which the First Amendment exists, and the book's evident lack of any even arguably legitimate purpose beyond the promotion and teaching of murder, render this case unique in the law. In at least these circumstances, we are confident that the First Amendment

> does not erect the absolute bar to the imposition of civil liability for which Paladin Press and amici contend.

App. 71a.

This analysis of the Court of Appeals was entirely appropriate and thoroughly convincing.[11] App. 16a.

## IV. THE DECISION BELOW DOES NOT CONFLICT WITH THE PRINCIPLES OF *THE FLORIDA STAR v. B.J.F.* OR *SMITH v. DAILY MAIL PUBLISHING COMPANY.*

The decision below does not conflict with this Court's decisions in *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) and *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979). In *Florida Star* this Court rejected the imposition of liability for the inadvertent publication of the name of a rape victim, and in *Daily Mail* the Court struck down an indictment of two newspapers for violating a state statute forbidding the publication of the names of juvenile offenders without the written approval of the juvenile court. These cases merely recite the broad truism that "if a newspaper lawfully obtains truthful information about a matter of public significance, the state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Florida Star*, 491 U.S. at 533, *quoting Daily Mail*, 431 U.S. at 103.

Contrary to Paladin's suggestions, in these cases this Court *rejected* the sweeping position that the First Amendment absolutely bars the imposition of liability for the publication of truthful information lawfully obtained, instead holding that liability must be justified by the vindication of state interests of the "highest order." *Florida Star*, 491 U.S. at 532 ("Nor need we accept appellant's invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment. Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which

11. *See* DOJ Report at 30 & n.47 (citations omitted) ("Therefore, insofar as criminal culpability for dissemination of such information depends upon the distributors' intent—for example, upon whether a disseminator of bombmaking manuals had the conscious purpose of helping others to use the information to engage in unlawful conduct — the substance of the advocacy in such manuals could be used as material evidence of such intent."). App. 186a.

prudence counsels our not resolving anticipatorily.") Indeed, in *Florida Star* this Court actually acknowledged that protection of the identity of rape victims *did* constitute an interest of the highest order, *id.* at 537. The Court nonetheless found numerous constitutional flaws in Florida's regime, such as its singling out of the media for special treatment, and the lack of any restraining requirements of culpability or intent. *id.* at 538-40.

In contrast, the decision below predicates liability on a law of general applicability — the doctrines of criminal and tortious aiding and abetting. In *Cohen v. Cowles Media Company*, 501 U.S. 663 (1991), this Court refused to engraft a First Amendment defense unto a promissory estoppel claim brought against a newspaper that violated a promise of confidentiality it had granted to a source, stating that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* at 669.[12] The "truthful information" in *Hit Man* is not the identity of participants in judicial proceedings, but specific instruction and encouragement intended to be used to assist in aiding and abetting crime.[13]

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12. *See also Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (explaining that generally applicable tax laws may be applied against the press, while those that single it out for specially disadvantageous treatment may not); *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990) (sustaining generally applicable sales tax even as applied to religious books and merchandise); *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969) (sustaining application of antitrust laws to the press); *Associated Press v. United States*, 326 U.S. 1 (1945) (same); *Associated Press v. NLRB*, 301 U.S. 103 (1937) (sustaining application of National Labor Relations Act to the press); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946) (sustaining application of Fair Labor Standards Act to the press).

13. Thus, while the information in *Hit Man* is arguably in some sense "truthful," it is also information detailing activity that is thoroughly unlawful. This Court has frequently held, in the commercial speech context, that speech proposing illegal transactions is entitled to no First Amendment protection. *See Village of Hoffman Estates v. Flipside, Hoffman Estates Inc.*, 455 U.S. 489, 496 (1982) ("The ordinance is expressly directed a commercial activity

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Imposing tort liability for those who knowingly and intentionally traffic in the aiding and abetting of murder is clearly an interest of the highest order, and nothing in *Florida Star* or *Daily Mail* stands as a barrier to such liability. Indeed, prior decisions of this Court demonstrate that liability frequently stems from the publication of truthful information when publication of that information infringes another's legally cognizable interests. *See, e.g., Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (First Amendment no bar to imposition of liability for invasion of common-law right of publicity); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 524 (1985) (First Amendment no bar to liability for copyright infringement in case arising from publication of presidential memoirs); *Snepp v. United States*, 444 U.S. 507 (1980) (First Amendment no bar to imposition of constructive trust on royalties from publication of mass market book published by former Central Intelligence Agency agent disclosing material not cleared by Central Intelligence Agency as required by preclearance agreement.)

## V. THE DECISION BELOW PRESENTS NO ISSUES OF EXTRAORDINARY IMPORTANCE.

Contrary to the shrill alarms sounded in the Petition for Certiorari, the sky will not fall on public discourse if the decision of the Court of Appeals is allowed to stand without immediate review by this Court. The grave constitutional evil supposedly posed by the Court of Appeals decision is that the Paladin will now be forced to litigate, before a trier-of-fact, the issue of whether it actually possessed the intent to which it stipulated for the purposes of its Motion for Summary Judgment.

The position is utterly untenable. The gist of Paladin's Motion for Summary Judgment was the legal argument that *even if* it possessed the intent to which it stipulated — an intent also brazenly manifest on the pages of *Hit Man* itself — it was nonetheless immune from liability as a matter of law. If Paladin's legal position fails — if the First Amendment does not absolutely bar liability under such predicate circumstances —

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(Cont'd)
promoting or encouraging illegal drug use. If that activity is deemed 'speech,' then it is speech proposing an illegal transaction, which a government may regulate or ban entirely."). *See also Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563-64 (1980); *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 388 (1973).

than *of course* it follows that Paladin must now bear the burdens of litigation, including the burden of inquiry into its subjective intent.

In *Herbert v. Lando*, 441 U.S. 153 (1979), a libel suit involving the CBS program *60 Minutes*, the defendants argued that the First Amendment precluded inquiry into the subjective state of mind of the program's journalists and producers, on the theory that this inquiry into editorial processes would itself chill the exercise of First Amendment freedoms. This Court rejected the argument, noting that subjective state of mind was an integral element of the First Amendment standard in public official libel cases created by the "knowing or reckless falsehood" test of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). This Court observed that

> Courts have traditionally admitted any direct or indirect evidence relevant to the state of mind of the defendant and necessary to defeat a conditional privilege or enhance damages. The rules are applicable to the press and to other defendants alike, and it is evident that the courts across the country have long been accepting evidence going to the editorial processes of the media without encountering constitutional objections.

*Herbert v. Lando*, 441 U.S at 164.

Yet Paladin maintains that under the rule announced by the Court of Appeals every manner of expression may now be hailed into court on the question of the publishers' intent, from the thriller novels of Tom Clancy to network news reports on terrorist bombings. This is patently untrue. Paladin published a murder manual intended to train killers, not a novel intended to entertain, or a news report intended to inform. This is indeed a case "unique in the law," as the Court of Appeals observed, App. 71a, precisely because of the Paladin's stunning conduct, as evidenced on this record both by its extraordinary stipulations and by the brazen text of *Hit Man* itself. *See* App. 62-63a ("There is nothing even arguably tentative or recondite in the book's promotion of, and instruction in, murder."). Paladin has stipulated its bed, and it must lie in it.

There is simply *no* credible threat to other publications posed by the standard employed by the Court of Appeals, because there is no

credible likelihood that those publications could *ever* be found to posses the intent to which Paladin has stipulated. As the Court of Appeals emphasized,

> not only will a political, informational, educational, entertainment, or other wholly legitimate purpose for the description or depiction be demonstrably apparent; but the description or depiction of the criminality will be of such a character that an inference of impermissible intent on the part of the producer or publisher would be unwarranted as a matter of law.

App. 69a.

It is of course a truism that under the standard announced by the Court of Appeals, suits against novels or movies may be *brought*. But that is true under any legal standard short of absolute immunity. As the Court of Appeals persuasively demonstrated, however, there is virtually zero chance that any such suit may ever be successfully *maintained*. App. 69a. ("So, for example, for almost any broadcast, book, movie, or song that one can imagine, an inference of unlawful motive from the description or depiction of particular criminal conduct therein would almost never be reasonable, for not only will there be (and demonstrably so) a legitimate and lawful purpose for these communications, but the contexts in which the descriptions or depictions appear will themselves negate a purpose on the part of the producer or publisher to others in their undertaking of the described or depicted conduct." *citing Miller v. California*, 413 U.S. 15 (1973).)

Paladin attempts to avoid the thrust of this entirely dispositive argument by arguing that the instruction manual *Hit Man* is ambiguous in its intent. Paladin repeatedly dismisses its own manual as tongue-in-cheek comedy or farce. This refrain rings hollow against the tragic and stark reality of the deaths of three innocent people. At most, it is jury argument. The Court of Appeals, obviously frustrated by the extravagance of this point, used even stronger words:

> After carefully and repeatedly reading *Hit Man* in its entirety, we are of the view that the book so overtly promotes murder in concrete, nonabstract terms that we regard as disturbingly disingenuous both Paladin's

> cavalier suggestion that the book is essentially a comic book whose "fantastical" promotion of murder no one could take seriously, and amici's reckless characterization of the book as "almost avuncular."

App. 42a.

In sum, the cries of panic that permeate the Petition for Certiorari ought not distract this Court, which should accept as eminently sound the Court of Appeals' patient and meticulous review of *Hit Man*, a review that overwhelming established the Respondents' entitlement to a jury trial:

> The unique text of *Hit Man* alone, boldly proselytizing and glamorizing the crime of murder and the "profession" of murder as it dispassionately instructs on its commission, is more than sufficient to create a triable issue of fact as to Paladin's intent in publishing and selling the manual.

App. 42a.

## CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition for Certiorari be denied.

Respectfully submitted,

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